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SURRENDER*

A "Surrender" is defined by Lord Coke as a yielding up of an estate for life or years to him that hath an immediate estate in reversion or remainder, wherein the estate for life or years may drown by mutual agreement between them.¹ This statement has been followed, more or less closely, by such other writers as have undertaken to define the term,² and there has never been any question made as to its substantial correctness. A surrender, then, is a particular mode or form of transfer, which derives its distinguishing characteristics from the fact that it is made by the tenant of a particular estate to the reversioner or remainderman.

This technical meaning of the word has, unfortunately, been to some extent obscured by its frequent use in an untechnical sense, as referring to relinquishment or yielding up, not of an estate, but of the possession of the premises, as when the lessee covenants to "surrender" the premises in good condition at the end of the term, and the courts, as will be shown hereafter, frequently, in using the term, fail to clearly distinguish between such a surrender of possession and a surrender, properly so called, of a particular estate for life or for years. Quite frequently, in using the term even in its technical sense, a surrender "of the lease" is spoken of, but this must be understood as merely an elliptical expression signifying a surrender of the particular estate or term created by the lease.

It seems desirable, in order to form a clear idea of the law of surrender, to briefly consider its relation to that of merger, which latter, though formerly the subject of much discussion and adjudication, is at the present time of but little practical importance. In the case of a surrender, the particular estate for life or for years comes to an end as a result of the act of surrender, in compliance with the intention with which the surrender was made, while a merger of the particular estate in the reversion occurs as a result of the fact that the two estates are vested in one person, by a conveyance either of the reversion to the particular tenant, or of the particular estate to the reversioner.³ For most all practical purposes, however, it is entirely immaterial whether, upon a conveyance of the particular estate to the reversioner, the consequent destruction of the estate be regarded as a result of the fact that

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¹ Co. Litt, 337b.

² Greenleaf's *Cruise's Dig.*, Tit. 32, ch. 7, § 2; 2 Platt, *Leases*, 499; Comyn, *Landlord and Tenant*, 336; Taylor, *Landlord and Tenant*, § 507; 1 Washburn, *Real Property*, § 735.

³ 3 Preston, *Conveyancing*, 8; Challis, *Real Property*, 67.

the conveyance was intended to take effect as a surrender, or of the fact that, both estates being vested in the same person, the particular estate is merged. There is, however, one case in which there is a difference in the practical results of a surrender and of a merger. When there is a life estate in one person, with a reversion in two persons as joint tenants, if the tenant for life should surrender his estate to one of the joint tenants, it would be extinguished, since a surrender to one of two joint tenants is as effectual as a surrender to both, while, on the other hand, if the life tenant should make a conveyance to one of the reversioners which is not intended to, and does not, take effect as a surrender, but is merely such as might be made to a stranger, one moiety only of the life estate would be merged in the moiety of the reversion belonging to the grantee, and the other moiety of the life estate would be vested in such grantee as tenant *pur autre vie*, with the reversion thereon in the other joint tenant.⁴ Since, however, a surrender may be effected by any words of conveyance, it seems that the presumption would always be, in the absence of an express showing to the contrary, that the instrument transferring the particular estate to the reversioner was intended to take effect as a surrender,⁵ and consequently, even in the case above suggested, of a conveyance to one of two joint tenants of the reversion, the particular estate would ordinarily be extinguished as a whole and not in part only.

PARTIES TO SURRENDER

A surrender may be made by such persons, and no others, as have personal capacity to make a grant.⁶ Consequently a surrender by an infant may be repudiated by him upon his attainment of full age.⁷ And a surrender by one *non compos mentis*, even if regarded as voidable merely and not absolutely void, may be repudiated by him on recovery of his faculties.⁸ A lessee who has not yet entered under his lease, cannot, strictly speaking, make an express surrender, for the technical reason that, until his entry, there is "no reversion in which the possession may drown,"⁹ and so in the case of a lease to take effect *in futuro*, there can be no express surrender, since there is no reversion, the lessee having

⁴ Co. Litt, 183a, 192b; 3 Preston, *Conveyancing*, 24; Challis, *Real Property*, 67.

⁵ Sheppard's *Touchstone* (Preston's Ed.), 307.

⁶ Sheppard's *Touchstone*, 303.

⁷ Zouch v. Parsons, 3 Burr. 1179.

⁸ Thompson v. Leach, 2 Vent. 198 note. See authorities cited, 2 Tiffany, *Real Property*, § 503.

⁹ Bac. Abr. tit., *Leases* (S.), 2, 2.

merely an *interesse termini*.¹⁰ In such a case, however, of an attempted surrender by the lessee of his *interesse termini*, if this is accepted or acquiesced in by the lessor, the transaction may, it seems, be regarded as evidencing a valid agreement for the discharge of the obligation for rent, which is, presumably, until entry by the lessee, of a purely contractual character. This would be merely an application of the principle that contractual obligations, though evidenced by writing, may be discharged by oral agreement.¹¹ But if the lease is under seal, the mere oral agreement of the parties, evidenced by the attempted surrender of the *interesse termini* and the lessor's acquiescence therein, might not be regarded as effective to discharge the lessee's obligations for rent, in view of the rule, recognized in a number of jurisdictions, that a contract under seal can be discharged only by a sealed writing. One claiming under an assignment of the leasehold has the same right as the original lessee to surrender such interest, even though he has not entered under the assignment,¹² as has an assignee by operation of law, such as an executor or administrator.¹³ The surrender must of course be by one who has power of disposition over the particular estate sought to be surrendered. Accordingly a surrender, by a husband, of the leasehold interest in premises occupied by him as a homestead, is invalid without the joinder of his wife, he having no power by his sole conveyance to dispose of the homestead.¹⁴ And one of several joint lessees cannot, by a surrender, destroy the interests of the others,¹⁵ though he may, it seems, surrender his own undivided interest.¹⁶

A surrender can be made only to the person having the next immediate estate following upon the particular estate surrendered.¹⁷ Accordingly a subtenant cannot surrender to the chief landlord, unless the latter has first acquired the original leasehold interest.¹⁸ For the same reason, "if a lessee grants part of his estate to the lessor, whereby a reversion continues in himself, this is no surrender; as if a lessee for twenty years grants all his estate to the lessor, except one year, month, or day, at the end of the term, this is not any surrender, because the lessee has a reversion,"¹⁹ and con-

¹⁰ Co. Litt, 338a.

¹¹ See Hammon, *Contracts*, 861.

¹² Bac. Abr. tit., *Leases* (S.), 2, 2.

¹³ Sheppard's *Touchstone*, 303; *Deane v. Caldwell*, 127 Mass. 242.

¹⁴ *Beranek v. Beranek*, 113 Wis. 272.

¹⁵ *Williams v. Vanderbilt*, 145 Ill. 239, 36 Am. St. Rep. 486.

¹⁶ Sheppard's *Touchstone*, 303.

¹⁷ Sheppard's *Touchstone*, 303.

¹⁸ Bac. Abr. tit., *Leases* (S.), 2, 1.

¹⁹ 2 Rolle's Abr. 497 (1) 30, quoted in *Burton v. Barclay*, 7 Bing. 745.

sequently there is an estate intervening between that surrendered and that of the person to whom the surrender is made. If the landlord has, during the term, made another valid lease which is to take effect during the term, a "concurrent" lease, as it is technically termed, the reversion on the first lease is vested in the second lessee and the surrender must be made to him.²⁰ But if the second lease is by its terms not to take effect until the termination of the first term, that is, if it is a lease "in reversion," it passes no present interest in the reversion, and the surrender of the first leasehold must be made to the original lessor.²¹ Provided the person to whom the surrender is made has the immediate reversion, it is immaterial that his only interest is a term of years shorter than that surrendered.²² But an estate for life cannot be surrendered to one who has a reversion for years only.²³ In the case of a reversion held in joint tenancy, a surrender to one joint tenant is effectual as to all.²⁴ A surrender to an infant or insane person is no doubt, like any other conveyance to such a person, valid, so far as for the benefit of such person, until repudiated by him after obtaining full legal capacity.²⁵

EXPRESS SURRENDER

There is, in the law of surrender, a distinction of primary importance, between a surrender in express terms, and a surrender which the law implies from the acts of the parties, a surrender "by operation of law." We will first consider the requisites and characteristics of a surrender in express terms, known as an "express surrender" or as a surrender "in fact" or "in deed." Such a surrender may be of the leasehold interest in either a part or in all of the premises."²⁶

At common law, while an express surrender of a particular estate in things which lay in grant, that is, in "incorporeal" things, as

²⁰ *Edwards v. Wickwar*, L. R. 1 Eq. 403; *Comyn, Landlord and Tenant*, 336.

²¹ *Smith v. Day*, 2 M. & W. 684. This is implied in the decision in *Dickson v. Lehnen*, 37 Fed. 319, that the prior lessee has no right to surrender possession to the lessee in reversion.

²² *Bac. Abr. tit., Leases (S.)*, 1, 2; *Hughes v. Robotham*, Cro. Eliz. 302.

²³ *Sheppard's Touchstone*, 303.

²⁴ *Co. Litt.*, 183a, 192, 214a; 3 *Preston, Conveyancing*, 24. But in *Sperry v. Sperry*, 8 N. H. 477, it was decided that a surrender to one of two joint lessors was insufficient. It does not appear whether they held in joint tenancy or as tenants in common. In *Churchill v. Lammers*, 60 Mo. App. 244, it was decided that an acceptance of a surrender by one joint lessor bound the other, so as to bar any recovery for rent, on the ground that one of two joint obligees can release an obligation.

²⁵ See authorities cited, 2 *Tiffany, Real Property*, §§ 502, 503.

²⁶ *Bac. Abr. tit., Leases (S.)*, 2, 3; *Pleasant v. Benson*, 14 East, 234; *Ehrman v. Mayer*, 57 Md. 612.

well as of a particular estate in "corporeal" things which, as not being a present estate in possession, was transferable by grant only, could be made only by writing under seal, a particular estate which was transferable by livery of seisin or by word of mouth, such as a present estate for life or for years in "corporeal" things, could be surrendered by word of mouth merely.²⁷ This was, however, changed by the provision of the Statute of Frauds (St. 29, Car. 2, c. 3, § 3) that no leases, estates or interests of freehold or terms of years, or any uncertain interest in lands, tenements or hereditaments should be assigned, granted or surrendered unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering, or his agent thereunto lawfully authorized by writing, or by act and operation of law. This provision has been recognized as operative in at least one state in this country,²⁸ while in a few others a provision expressed in substantially similar language has been adopted.²⁹ In New York it is provided that no estate or interest in lands, other than leases for a term not exceeding one year, shall be created, granted, assigned or surrendered, unless by act or operation of law, or by a deed or conveyance in writing;³⁰ and this language has been adopted in a number of other states.³¹ In Maine it is merely provided that no estate or interest in lands can be granted, assigned or surrendered, unless by writing signed by the grantor or his attorney,³² and in other New England states a similar provision is found, with the addition of an exception in favor of an assignment or surrender "by operation of law."³³ In some states, where the local statute does not in terms require any writing in the case of a surrender, there are express provisions that any interest in lands, or any interest greater than a lease for a term named, can be transferred or assigned only by writing,³⁴ and

²⁷ Co. Litt, 338a; Sheppard's *Touchstone*, 300.

²⁸ In Maryland. See *Lamar v. McNamee*, 10 G. & J. 126; *Lammott v. Gist*, 2 H. & G. 433. Also, apparently, in Washington. See Ballinger's Codes, § 4783 note; *Hart v. Pratt*, 19 Wash. 560.

²⁹ Ark. S. & H. Dig., § 3479; Fla. Rev. St., § 1950; Mo. Rev. St., 1889, § 5183; N. J. Gen. St., p. 1602, § 1; Ohio Ann. Code, § 4198; Pa. Pepper & Lewis' Dig., p. 2190, § 1; S. C. Codes 1902, § 2651.

³⁰ N. Y. Real Prop. Law, § 207. See *Coe v. Hobby*, 72 N. Y. 145; *Ramsay v. Wilkie*, 36 N. Y. St. Rep. 864, 13 N. Y. Supp. 554.

³¹ Mich. Comp. Laws, § 9509; Minn. Stat. 1894, § 4213; Mont. Code Civ. Proc., § 3274; Neb. Consol. St. 1891, § 1785; Nev. Comp. Laws, § 2694; Utah Rev. St., § 1974; Wis. Rev. St., § 2302. See *Kittle v. St. John*, 7 Neb. 73; *Burnham v. O'Grady*, 90 Wis. 461.

³² Me. Rev. St. 1903, ch. 75, § 13.

³³ Mass. Rev. St., ch. 127, § 3; N. H. Pub. St., ch. 137, § 12; Vt. St. 1894, § 2218.

³⁴ See Cal. Civil Code, § 1091; Conn. Gen. St. 1892, § 4029; Ind. Burns' Stat. 1901, § 6650; Kan. Gen. St., § 3071; Ky. St. 1903, § 490; N. Dak. Rev. Codes, § 3531; R. I. Gen. St., ch. 202, § 2.

these, it would seem, are applicable to a surrender as well as to any other conveyance.³⁵ In some states there are statutory enactments, directed in terms against oral contracts for the sale or transfer of interests in lands, but not against oral transfers themselves. So far as such a provision might in any state be construed as prohibiting oral conveyances of land, it would, it seems, apply to conveyances by way of surrender.³⁶

It seems that, before the Statute of Frauds, a cancellation of the lease, in pursuance of an agreement by the parties, would have been sufficient as a surrender, this showing, as strongly as an oral surrender, the intention of the tenant of the particular estate to relinquish his interest to the reversioner, and the intention of the latter to accept the relinquishment.³⁷ That the statute, however, renders the cancellation of the lease ineffective as a surrender, is well settled,³⁸ and the fact that the lease is found in the possession of the lessor in a cancelled state does not, it has been decided, warrant any inference that there was a written surrender which has been lost.³⁹ It is said by Chief Baron Gilbert in this regard, that "the intent of the Statute of Frauds was to take away the manner they formerly had of transferring interests in lands, by signs, symbols, and words only, and therefore, as a livery and seisin on a parol feoffment, was a sign of passing the freehold before the statute, but is now taken away by the statute, so I take it that the cancellation of a lease was a sign of a surrender before the statute, but is now taken away, unless there be a writing under the seal of the party."⁴⁰ According to one or two of the older authorities, indeed, it seems that a cancellation of a lease might under some circumstances have the effect of revesting the estate created thereby in the lessor, not as being equivalent to an oral surrender, but as destroying all evidence of the demise.⁴¹ But such a theory has been

³⁵ But in *McKenzie v. Lexington*, 4 Dana (Ky.) 129, it is decided that the failure to re-enact the third section of the English Statute of Frauds is evidence of an intention to dispense with the formality of a writing in the case of a surrender, and there is no suggestion that the general provisions of the local statute as to conveyances of interests in lands would supply its place.

³⁶ The provision of the Delaware statute (Rev. Code, p. 526, § 7) that no action shall be brought on "any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them," unless in writing, seems to have been regarded as requiring a surrender to be in writing. *Logan v. Barr*, 4 Harr. 546.

³⁷ See *Magennis v. MacCollough*, Gilb. Eq. Cas. 235.

³⁸ *Roe v. Archbishop of York*, 6 East 86; *Ward v. Lumley*, 5 H. & N. 87; *Doe v. Thomas*, 9 B. & C. 288; *Rowan v. Lytle*, 11 Wend. 616.

³⁹ *Doe v. Thomas*, 9 B. & C. 288.

⁴⁰ *Magennis v. MacCollough*, Gilb. Eq. Cas. 235.

⁴¹ See *Anon*, Moor, 35 pl. 116; *Viner's Abr. tit. Fails* (U.); *Bacon's Abr. tit. Leases* (T.) By some authorities such effect is to be given to the cancellation of a lease or other

entirely repudiated in modern times, it being a positive rule, in almost every jurisdiction, that the cancellation of an instrument of conveyance, after its delivery, does not revest the estate in the maker thereof.⁴² The question whether a cancellation of the lease was, before the Statute of Frauds, equivalent to an oral surrender, is of interest in those states in which there is no statutory requirement that a surrender be in writing. In Illinois, where such is the case, it was decided by the intermediate appellate court, quoting the above language of Chief Baron Gilbert, that a surrender may be made by cancellation.⁴³ But a different view has been taken in the highest court of the state, on the ground that the cancellation of a deed will not destroy its effect, though it is at the same time said that the cancellation of the lease may, in connection with the subsequent conduct of the parties, authorize a finding of a surrender, as a matter of fact.⁴⁴ In that state then, it appears, that, while an oral surrender is valid, a cancellation is not, of itself, proof of an intention to surrender, and so, equivalent to an oral surrender, but it must be accompanied by other evidence of such an intention to make it effective for this purpose.

The third section of the English Statute of Frauds, requiring a surrender to be in writing, contains no exception in reference to leases for short terms, such as, by the previous sections, exists in connection with the requirement of a writing for the creation of a leasehold interest. And the English cases are to the effect that the requirement of a writing applies to a surrender of a leasehold interest which, under the previous sections, is susceptible of creation orally.⁴⁵ In Pennsylvania, however, Chief Justice Gibson has expressed strong disapprobation of these decisions, on the ground of the improbability that the legislature could have intended to require greater formalities for the extinction of the interest than for its creation.⁴⁶ In New York it has been decided that the stat-

conveyance, when the subject thereof is a thing which lies in grant, as an incorporeal hereditament, but not when it is of a thing which lies in livery, the grant being in the former case regarded as the essential instrumentality of transfer. See *More v. Salter*, 3 Bulstr. 79; *Miller v. Manwaring*, Cro. Car. 399; Gilbert, *Evidence*, 111, 112. But this position has been denied. *Bolton v. Bishop of Carlisle*, 2 H. Blackst. 259, and there is evidently no such distinction at the present day, since corporeal things as well as incorporeal are transferred by grant. *Stewart v. Aston*, 8 Ir. Com. Law N. S. 35, and see *Ward v. Lumley*, 5 H. & N. 87.

⁴² See cases cited in 2 Tiffany, *Real Property*, p. 934, and 2 *Cyclopedia Law and Proc.* 187.

⁴³ *Beidler v. Fish*, 14 Ill. App. 29.

⁴⁴ *Brewer v. Nat. Building Ass'n*, 166 Ill. 221, affirming 41 Ill. App. 223.

⁴⁵ *Bolling v. Martin*, 1 Campb. 317; *Mollett v. Bayne*, 2 Campb. 103; *Doe v. Ridout*, 5 Taunt. 519. See the discussion of these and other cases in Browne, *Stat. of Frauds*, § 45. The same view is apparently taken in *Logan v. Barr*, 4 Har. (Del.) 546.

⁴⁶ *McKinney v. Reader*, 7 Watts, 123. This view is approved in *Greider's Appeal*, 5 Pa. St. 422, and an Indiana case in accord therewith, *Ross v. Schneider*, 30 Ind. 423.

utory provision requiring a writing for the surrender of "any estate or interest in lands other than for a term not exceeding one year," does not require a writing if at the time of the surrender less than a year of the term remains outstanding.⁴⁷ This decision is in accord with the construction of the legislative requirement in that state as to the making of a lease.⁴⁸

While the words "surrender, grant and yield up" are ordinarily used in a formal instrument intended to take effect as a surrender, no particular words are necessary, it being sufficient that an intention to transfer the leasehold interest to the reversioner clearly appears.⁴⁹ Accordingly, an instrument in form a lease of the premises by the tenant to the landlord has been regarded as sufficient as a surrender⁵⁰ as has what was in terms an "agreement" for the relinquishment of the leasehold, it being intended to take effect as a surrender.⁵¹ Apparently, in England, where a mortgage transfers the legal estate to the mortgagee, a mortgage of the leaseholds by the tenant to his landlord would take effect as a surrender,⁵² but such a result could not follow in any jurisdiction where a mortgage does not transfer the legal title.⁵³ A recital in a second lease to one already a tenant under a previous lease, that the previous lease has been surrendered, is not, it has been decided, sufficient as an express surrender of the previous lease, for the reason that the recital may be satisfied on the theory that the second lease operates, as hereafter explained, as a surrender of the first by operation of law, and it does not purport itself to be a relinquishment of the interest under a prior lease.⁵⁴ In Iowa it appears to have been considered that a recital in a receipt for rent that the lease has been surrendered is valid evidence of a surrender,⁵⁵ but it is perhaps questionable whether the statute of that state requires a surrender to be in writing signed by the maker thereof.⁵⁶

⁴⁷ *Smith v. Devlin*, 23 N. Y. 363.

⁴⁸ See *Browne*, Stat. of Frauds, § 34.

⁴⁹ *Sheppard's Touchstone*, 306; *Farmer v. Rogers*, 2 Wils. 26; *Weddall v. Capes*, 1 M. & W. 50; *Appeal of Greider*, 5 Pa. St. 422.

⁵⁰ *Lloyd v. Langford*, 2 Mod. 174; *Smith v. Mapleback*, 1 Term Rep. 441; *Shepard v. Spaulding*, 4 Metc. (Mass.) 416.

⁵¹ *Harris v. Hancock*, 91 N. Y. 340; *Allen v. Jaquish*, 21 Wend. (N. Y.) 628.

⁵² See *Cottee v. Richardson*, 7 Exch. 143.

⁵³ See *Breese v. Bange*, 2 E. D. Smith (N. Y.) 474.

⁵⁴ *Roe v. Archbishop of York*, 6 East, 86.

⁵⁵ *Jenkins v. Clyde Coal Co.*, 82 Iowa 618.

⁵⁶ The only statutory provision in that state which might be regarded as bearing on the subject appears to be that excluding evidence of a contract for the creation or transfer of any interest in lands, except leases for a term not exceeding one year if not in writing and signed by the party charged (Ann. Code, § 4625). This provision, however, seems to be regarded as applying to conveyances as well as contracts to convey. See *Hughes v. Lindsey*, 31 Iowa, 332; *Wickham v. Henthorn*, 91 Iowa, 242.

It is asserted in a modern English case, without any statement of the reasons for such a view, that a surrender cannot be made to take effect *in futuro*,⁵⁷ the actual decision being however merely that a notice by the lessee of an intention to give up possession at a certain date, though assented to by the lessor, did not constitute a surrender. To apparently the same effect as the above *dictum* is that of Lord Coke, that "he who hath a lease for twenty years cannot surrender the last ten years by any express surrender, saving to him the first ten years."⁵⁸ On the other hand it is asserted by writers of authority that a surrender may be made subject to a condition precedent,⁵⁹ and a surrender subject to such a condition is necessarily, so long as the condition is unsatisfied, one to take effect *in futuro*. In New York it has been decided that a surrender may be made to take effect *in futuro*, and this effect was given to a mere agreement by the lessee that, if he failed to make certain improvements by a date named, he would "then relinquish the contract,"⁶⁰ language which might, perhaps, as well have been construed as a mere agreement to make a surrender *in futuro*.⁶¹ In New Jersey also it has been decided that a surrender may be made to take effect *in futuro*.⁶² The view that a surrender cannot be made to take place *in futuro* is presumably based on the theory that a surrender, in its very nature, implies a *present* yielding up of the particular estate. In any case, however, if the instrument is in terms a transfer of the particular estate to the reversioner, to take effect in possession from and after a time or event named, it will, it seems, so operate, and upon the arrival of such time or the happening of the event named, the particular estate will become vested in the reversioner, and will be merged.⁶³ There is no question that a surrender may be made

⁵⁷ *Doe v. Milward*, 3 M. & W. 328, per Parke, B.

⁵⁸ *Ives' Case*, 5 Co. Rep. 11a.

⁵⁹ The statement in Sheppard's *Touchstone*, 307, repeated by Mr. Preston in his annotations thereto, that a surrender may be on a condition precedent or subsequent, is quoted with approval in *Doe v. Poole*, 11 Q. B. 713.

⁶⁰ *Allen v. Jaquish*, 21 Wend. 628.

⁶¹ An agreement by the lessor to accept the lessee's proposition to surrender, provided he would pay the rent due, was apparently regarded as not constituting a surrender. *McKenzie v. Lexington*, 4 Dana (Ky.) 129.

⁶² *Mundy v. Warner*, 61 N. J. L. 395. The syllabus says that the agreement was to "surrender possession" at a certain date, but the court speaks of it as an agreement "to surrender the term." An agreement to surrender possession in the future has apparently been in England regarded as not effective as a surrender. *Weddall v. Capes*, 1 M. & W. 50.

⁶³ That a transfer of such a future interest in a term of years is valid, apparently, as creating an executory interest. See article by J. C. Gray, Esq., in 14 *Harvard Law Review*, 403; 2 Preston, *Abstracts of Title*, 6, 144. But merger does not take place until such interest becomes a vested estate by the happening of the contingency or arrival of the time named, the law of merger not applying to executory interests. See 3 Preston, *Conveyancing*, 55, 493.

subject to a condition subsequent, the effect of the condition being to revest the leasehold interest in the tenant upon the happening of the contingency named.⁶⁴

It has been said, in an English case, that where a surrender in fact is so expressed as to show that the intention of the parties is to make the surrender only in consideration of the grant of a new lease to the same lessee, the sound construction of the instrument, in order to effectuate this intention, would make the surrender conditioned to be void in case the new lease is for any reason void.⁶⁵ The rule, however, appears to be different if such intention is not expressed in the instrument of surrender.⁶⁶ In a case in New York it was decided that after an express surrender the fact that a new lease, given in place of the former lease, was void, did not render the surrender nugatory, the new lease not being the only consideration for the surrender of the former lease, and it was at the same time said that the former lease could be reinstated only by a suit in equity on the ground of failure of consideration, fraud, or mistake.⁶⁷

Since, at common law, a surrender of a present estate in land did not require any writing, and the Statute of Frauds contained no requirement of a seal, it seems clear that ordinarily there is no necessity of a seal to render such a surrender valid, and this is so even though the lease itself be under seal, if not required to be under seal.⁶⁸ In the case, however, of things lying in grant, such as incorporeal hereditaments, or future estates, a seal was at common law necessary to validate a surrender thereof, since no other mode of transfer of such an interest was recognized,⁶⁹ and it would seem that this requirement may be regarded as still existent, though an occasion for its application would, in this country at least, rarely arise.

At common law a surrender, it was decided, is sufficient without

⁶⁴ Co. Litt, 218b; Sheppard's *Touchstone*, 307.

⁶⁵ *Doe v. Courtenay*, 11 Q. B. 702. See *Doe v. Poole*, 11 Q. B. 713.

⁶⁶ *Doe v. Bridges*, 1 B. & Ad. 847.

⁶⁷ *Clarke v. Barnes*, 76 N. Y. 301, 32 Am. Rep. 306.

⁶⁸ Co. Litt, 338a; *Farmer v. Rogers*, 2 Wils. 26; *Peters v. Barnes*, 16 Ind. 219; *Allen v. Jaquish*, 21 Wend. 628. In *Roe v. Conway*, 74 N.Y. 201, however, it is said to be "a serious question whether a lease for ten years can be cancelled and surrendered by an instrument not under seal." The statute of that state requires a seal in the case of a lease only when it is of a freehold interest, and contains no express requirement of a seal on a surrender. In Illinois, it has been decided that the rule forbidding the modification of a sealed contract by parol does not prevent a valid surrender not under seal, though the lease was under seal, for the reason that such rule does not apply in the case of the absolute discharge of a contract. *Alsichler v. Schiff*, 164 Ill. 298. The common law authorities do not thus view a surrender, as a discharge of a contract, but, as above stated, regard it rather as a reconveyance of the estate created by the demise.

⁶⁹ Co. Litt, 338a; 1 Wms. Saunders, 236a, note 9.

any acceptance thereof by the person to whom it is made, the same rule being adopted as regards a surrender as was applied to other conveyances.⁷⁰ In a number of the states of this country, on the other hand, the rule has been declared that a conveyance, except when made to an infant or other person not *sui juris*, is not valid until accepted by the grantee,⁷¹ and this rule would presumably apply in the case of a surrender. Even in jurisdictions where, as in England, an acceptance is not required, the grantee can repudiate the conveyance when it comes to his knowledge, and since he is ordinarily the only person interested in defeating a conveyance by way of surrender, the question whether his assent is necessary in the first place is not a very practical one. In California it has apparently been decided that an express surrender is not effective as such if the tenant making it retains possession of the premises.⁷² There is perhaps common law authority for this view,⁷³ but there is also the statement of a writer of high repute against it,⁷⁴ and it seems that a conveyance by way of surrender, like most other forms of conveyance at the present time, should operate to transfer the title, irrespective of the grantor's retention of possession. If the tenant, after executing and delivering a deed of surrender, still occupies the premises, he is, it is true, a tenant of the surrenderee, but his tenancy is not, it seems, under the surrendered lease, but is under a new demise. Even at common law an estate for life, which could ordinarily be transferred only by livery of seisin, could be surrendered without livery,⁷⁵ and, *a fortiori*, it would seem, a term of years could be surrendered without any equivalent formality. The English decision also, to the effect that a surrender is valid without any acceptance thereof,⁷⁶ clearly implies that no transfer of possession is necessary.

⁷⁰ Sheppard's *Touchstone* (Preston's ed.), 307; *Thompson v. Leach*, 2 Ventris, 198.

⁷¹ See decisions cited in 2 Tiffany, *Real Property*, § 407, note.

⁷² *Kower v. Gluck*, 33 Cal. 401, and see *Coburn v. Goodall*, 72 Cal. 498, 1 Am. St. Rep. 75.

⁷³ In Viner's Abr. tit. Surrender (G) 35, it is said, indeed, that "It is not properly a surrender, but where he who surrenders gives possession to him who takes by surrender," citing Bro. Abr. tit. Surrender, pl. 13, which in turn cites Y. B. 22 H. 6, 51. The passage in the year book merely says that it was agreed by the judges, with one exception, that "If I enfeoff two persons to hold to them and to the heirs of one, and he who has the freehold surrenders to his cotenant, this surrender is void by reason of the joint possession." The statement of Viner is, however, apparently supported by the citation from Brooke, where it is said: "If I enfeoff two, to have to them and the heirs of one, he who has the freehold cannot surrender to the other by reason of the joint possession, for the freehold cannot merge in the reversion, by reason that he who has the fee is jointly seised of the possession, for one cannot properly surrender but where he who surrenders gives possession to him who takes by the surrender."

⁷⁴ Sheppard's *Touchstone*, at p. 307, says: "The actual entry of the surrenderee into the land is not necessary."

⁷⁵ Co. Litt, 50a; 2 Blackst. Comm. 326.

⁷⁶ *Thompson v. Leach*, 2 Ventris, 198.

SURRENDER BY OPERATION OF LAW.

The provision of the English Statute of Frauds, requiring a surrender to be in writing, excepts from its scope surrenders "by act and operation of law." A like exception is found in most of the statutes in this country bearing on the subject.⁷⁷ But even in states where there is no express provision in that regard the doctrine of surrender by operation of law is recognized,⁷⁸ as it is in states where there is apparently no restriction imposed on the making of an oral surrender.⁷⁹

The courts have considered that there is a surrender by "act and operation of law" when transactions have taken place between the reversioner and the tenant of the particular estate, the landlord and tenant, which create a condition of facts inconsistent with the continued operation of the lease. The effect thus given to the transactions of the parties has been stated to be based on the theory of estoppel,⁸⁰ but all the elements of an estoppel are certainly not present in every case of such a surrender. Occasionally the theory seems to be asserted that the acts of the parties thus operate as a surrender because they show an agreement that the leasehold interest shall be surrendered.⁸¹ But a surrender can not properly be regarded as taking place by operation of law when it takes place by agreement of the parties, even though such agreement is manifested by acts and not by words,⁸² and even in jurisdictions where, owing to the absence of a statute requiring a surrender to be in writing, the mere acts of the parties might effect a surrender as showing an agreement to that effect, this would be properly termed an express surrender rather than one by operation of law. It is more satisfactory perhaps to regard the various decisions on the subject as involving an application of the principle of estoppel, somewhat modified to suit what the courts may have considered

⁷⁷ See the statutes above referred to of Arkansas, California, Florida, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Vermont, Utah, Wisconsin.

⁷⁸ See *Otis v. McMillan*, 70 Ala. 46; *Woodward v. Lindley*, 43 Ind. 333; *Withers v. Larrabee*, 48 Me. 570; *Brown v. Cairns*, 63 Kan. 584 (semble).

⁷⁹ See *Ledsinger v. Burke*, 113 Ga. 74; *Brown v. Cairns*, 107 Iowa, 727; *Ladd v. Smith*, 6 Oreg. 316; *Edwards v. Hale*, 37 W. Va. 193.

⁸⁰ See *Lyon v. Reed*, 13 M. & W. 285.

⁸¹ See *e. g.* *Talbot v. Whipple*, 14 Allen, 177; *Brewer v. National Union Building Ass'n*, 166 Ill. 221; *Meeker v. Shalsbury*, 66 N. J. L. 60; *Bedford v. Terhune*, 30 N. Y. 453; *Tobener v. Miller*, 68 Mo. App. 509; *Hart v. Pratt*, 19 Wash. St. 560.

⁸² So in *Felker v. Richardson*, 67 N. H. 509, it is said, per Carpenter, J., "A surrender by agreement, whether express or implied, is the act not of the law but of the parties. To constitute a surrender by operation of law, overt acts of both parties inconsistent with the continuance of the term are essential."

the exigencies of the case. The transactions which have been regarded as giving rise to a surrender by act and operation of law are of various distinct classes, and they will be considered accordingly.

ACCEPTANCE OF NEW INTEREST.

If the tenant accepts from the landlord a new lease, to take effect during the continuance of the interest created by the previous lease, this is regarded as effecting a surrender by operation of law, on the theory that, by the acceptance of the new lease, the tenant becomes a party to an act the validity of which he is estopped to dispute, but which could not be valid if the estate created by the first lease continued to exist.⁸³ This view as to the effect of the acceptance of a second lease was fully recognized before the Statute of Frauds,⁸⁴ and therefore cannot be regarded, as may perhaps other instances of surrender by operation of law, in the light of an attempt to carry out the agreement of the parties though not expressed in writing, and thus to avoid the operation of the statute. In the case of a so-called "lease in fee," which is properly a conveyance in fee, reserving a rent, there can of course be no surrender, since there is no reversion, but the subsequent taking of a new lease by the grantee has been regarded as a release of all rights under the former conveyance.⁸⁵

Since a surrender by reason of the acceptance of a new lease takes place by operation of law, and not by the act of the parties, it would seem logically to follow that the intention of the parties is immaterial, and there are occasional *dicta* to that effect.⁸⁶ The view has, however, been elsewhere asserted that the new lease does not result in a surrender when this is contrary to the apparent intention of the parties.⁸⁷ Thus a contrary intention was inferred and given effect when to hold otherwise would have deprived the tenant of the benefit of the covenant in the prior lease for compensation for improvements erected by him.⁸⁸

⁸³ *Lyon v. Reed*, 13 M. & W. 285; *Otis v. McMillan*, 70 Ala. 46; *Welcome v. Hess*, 90 Cal. 507; *Flagg v. Dow*, 99 Mass. 18; *Enyeart v. Davis*, 17 Neb. 228; *Schreffelin v. Carpenter*, 15 Wend. 400; *Coe v. Hobby*, 72 N. Y. 141, 28 Am. Rep. 120; *Edwards v. Hale*, 37 W. Va. 193.

⁸⁴ *Perkins*, § 617; *Sheppard's Touchstone*, 301; *Fulmerston v. Steward*, Plowd. 107b; *Ives v. Sams*, Cro. Eliz. 522; *Comyn's Digest*, tit. Surrender (ii).

⁸⁵ *Springstein v. Schermerhorn*, 12 Johns. (N. Y.) 357.

⁸⁶ *Lyon v. Reed*, 13 M. & W. 285; *Brown v. Cairns*, 107 Iowa, 727; *Enyeart v. Davis*, 17 Neb. 228.

⁸⁷ *Smith v. Kerr*, 108 N. Y. 31, 2 Am. St. Rep. 362; *Wilmark v. N. Y. Elevated R. Co.*, 76 Hun. 302, 27 N. Y. Supp. 777; *Flagg v. Dow*, 99 Mass. 18 (semble); *Thomas v. Zumbalen*, 43 Mo. 471.

⁸⁸ *Van Rensselaer v. Penniman*, 6 Wend. 568. But *Jungerman v. Bovee*, 19 Cal. 354, is apparently *contra*.

In England, while the courts have not gone to the same extent as the American decisions last cited, in refusing to give the effect of a surrender to the acceptance of a new lease when a surrender was apparently not intended, they have gone so far as to hold that, in order that the acceptance of a second lease may thus operate, the lease must be good and sufficient to pass an interest according to the contract and intention of the parties.⁸⁹ Thus it has been decided that if the lease is made by a tenant for life, undertaking to act under a power, and the lease is not a valid execution of the power, a surrender does not result, although the lease was valid until the death of the tenant for life.⁹⁰ In New York, likewise, it has been decided that, if the second lease is intended to create a term, and because not executed as required by the Statute of Frauds, it creates merely a tenancy from year to year, no surrender results,⁹¹ and a like decision was made where there was an outstanding dower interest in one who did not join in the second lease.⁹² Where the second lease was effected by fraud on the part of the lessor, it was held, in that state, that, in an action for rent, the lessee was entitled to equitable relief in the shape of the cancellation of the first lease and the re-establishment of the second lease.⁹³ If the second lease is void *ab initio*, its acceptance cannot result in a surrender of the first lease.⁹⁴ The operation of a second lease as effecting a surrender of the term previously existing is not prevented by the fact that it is subject to a condition subsequent, which may cause a forfeiture of the interest created thereby, and if the condition is enforced both leases will thereafter be inoperative.⁹⁵ If the second lease covers but a part of the land covered by the first lease, there is a surrender as to such part and no more.⁹⁶ If one only of two or more joint lessees accepts a second lease, there is a surrender of his undivided interest, and not of the interests of the others, unless he was authorized to act for them.⁹⁷

In order that the new lease thus result in a surrender, it need not

⁸⁹ Lloyd v. Gregory, 1 Wm. Jones, 405; Davison v. Stanley, 4 Burr. 2210; Schreffelin v. Carpenter, 15 Wend. 400.

⁹⁰ Doe v. Poole, 11 Q. B. 713; Doe v. Courtenay, 11 Q. B. 702, per Coleridge, J.

⁹¹ Coe v. Hobby, 72 N. Y. 141, 28 Am. Rep. 120.

⁹² Chamberlain v. Dunlop, 126 N. Y. 45, 22 Am. St. Rep. 80.

⁹³ Powell v. F. C. Lynde Co., 49 App. Div. 286, 64 N. Y. Supp. 153. The prior lease had been "cancelled," but since cancellation does not effect a surrender, in view of the statutory requirement of a writing, this would seem to have been immaterial.

⁹⁴ Roe v. Archbishop of York, 6 East, 86; Easton v. Penny, 67 L. Times, 290.

⁹⁵ Co. Litt. 218b; Sheppard's Touchstone, 301; Bac. Abr. tit. Leases (S. 2, 1); Doe v. Poole, 11 Q. B. 713.

⁹⁶ Carnarvon v. Villebois, 13 M. & W. 342; Morrison v. Chadwick, 7 C. B. 266; Bac. Abr. tit. Leases (S. 3). But in Banker v. Braker, 9 Abb. N. C. (N. Y.) 411, such a new lease of part is regarded as rendering the former lease inoperative.

⁹⁷ Sheppard's Touchstone, 302.

be for as great a term as the first lease,⁹⁸ since it is the tenant's acceptance of a new inconsistent interest which is the controlling consideration.⁹⁹ And for the same reason, though the second lease is not to begin till some time named in the future, there is an immediate surrender of the interest under the first lease. But a new lease which is not to take effect until after the end of the existing term would not effect a surrender of such term, since there is no inconsistency in the interests created by the two leases.¹⁰⁰ If it is uncertain whether the interest created by the new lease will begin before the end of the existing term, as when it is subject to a condition precedent which may or may not occur before that time, the second lease will not, it seems, effect a surrender until the contingency actually happens, and consequently the surrender will operate only on the residue of the term then outstanding.¹⁰¹

It has been decided in this country, that a surrender will result although the second lease is oral merely, provided it is valid as such, while the original lease was in writing or even under seal.¹⁰² This was the rule in England before the Statute of Frauds,¹⁰³ and, in spite of a dictum that "it would be most dangerous to allow a term created by an express demise to be thus got rid of by parol evidence,"¹⁰⁴ there are modern cases in that country to the same effect, though without any direct consideration of the question.¹⁰⁵ Thus it has there been decided that where the tenant agreed with the landlord that the latter should give a new lease to him and to another, and they entered under such agreement, pending the execution of the new lease, they became tenants at will or from year to year, with the result that the term previously existing in the single tenant was surrendered.¹⁰⁶ The view that a surrender may be thus effected by a new verbal lease is no doubt contrary to the spirit of the Statute of Frauds, but it seems to be a logical application of

⁹⁸ *Ives' Case*, 5 Co. Rep. 11a; *Dodd v. Acklom*, 6 M. & G. 672, 679; *Enyeart v. Davis*, 17 Neb. 228; *Wade v. South Penn. Oil Co.*, 45 W. Va. 380.

⁹⁹ *Ives' Case*, 5 Co. Rep. 11a; *Hutchins v. Martin*, Cro. Eliz. 605.

¹⁰⁰ Bac. Abr. tit. *Leases* (S.) 2, 1; *Tracy v. Albany Exchange Co.*, 7 N. Y. 472.

¹⁰¹ Bac. Abr. tit. *Leases* (S.) 2, 1; *Anon.*, 4 Leon. 30.

¹⁰² *Schrefflin v. Carpenter*, 15 Wend. 400; *Coe v. Hobby*, 72 N. Y. 141, 28 Am. Rep. 120. In *Andre v. Graebner*, 126 Mich. 116, an oral agreement between the lessor and lessee for a term of years that the holding should be from month to month was given effect as terminating the rights under the old lease. There the court, however, discusses the question as one of the modification of a contract by a subsequent agreement, and there is no reference to the doctrine of an implied surrender.

¹⁰³ *Comyn's Dig.* tit. *Surrender* (T. 1).

¹⁰⁴ *Per Pollock, C. B.*, in *Foquet v. Moor*, 7 Exch. 870, and to the same effect see *Doe v. Johnson*, McClel. & Y. 141.

¹⁰⁵ *Fenner v. Blake* (1900), 1 Q. B. 426; *Peter v. Kendal*, 6 B. & C. 703.

¹⁰⁶ *Hamerton v. Stead*, 3 B. & C. 478.

the general rule as to a surrender resulting from a new lease, and it is in accordance with the apparent tendency of the courts to enlarge the scope of the exception, in the statute, of surrender by operation of law.

Apart from any question arising from the verbal character of the new lease, the question as to what constitutes a new lease or demise for this purpose is one as to which the decisions are not entirely clear. A mere change in the amount of the rent by agreement is not the making of a new demise,¹⁰⁷ and consequently this does not of itself effect a surrender,¹⁰⁸ though it may be evidence, with other facts, to show a new demise and consequent surrender.¹⁰⁹ And it has been decided that a relinquishment by the tenant to the landlord of the possession of part of the premises does not effect a surrender of the leasehold in the whole, as involving a new demise, whether or not this is accompanied by a reduction in the amount of rent.¹¹⁰ An agreement for a new lease to be made in the future does not have the effect of a new lease in effecting a surrender of the existing tenancy.¹¹¹ And the same view has been taken of an agreement by the landlord not to disturb the tenant in his possession until a date subsequent to the end of the existing term, on the ground, it is said, that this was intended as an agreement merely, and not as a demise.¹¹² The same might be said, it would seem, of an agreement between the landlord and tenant, that the former should quit at a certain date prior to the end of the term named in the original lease, but this has been decided, in the same jurisdiction, to involve a new demise, effecting a surrender of the term previously existing.¹¹³ In this country a new agreement to the effect

¹⁰⁷ *Donellan v. Read*, 3 B. & Ad. 899; *Doe v. Geikie*, 5 Q. B. 84; *Crowley v. Vitty*, 7 Exch. 319.

¹⁰⁸ *Coe v. Hobby*, 72 N. Y. 141, 28 Am. St. Rep. 120; *Smith v. Kerr*, 108 N. Y. 31, 2 Am. St. Rep. 362; *Hurt v. Woodland*, 24 Md. 393; *Taylor v. Winters*, 6 Phila. 126; *Edwards v. Hale*, 37 W. Va. 193; *Donellan v. Read*, 3 B. & Ad. 899; *Crowley v. Vitty*, 7 Exch. 319; *Clarke v. Moore*, 1 Jones & Lat. (Ir.) 723.

¹⁰⁹ *Jones v. Bridgeman*, 39 *Law Times*, 500; *Ex parte Vitale*, 47 *Law Times*, 480. In *Conklin v. Tuttle*, 52 Mich. 630, where the lessor before the end of the term notified the lessee to quit, which the latter was about to do, but remained in possession on the lessor's promise to make repairs, there was, it was decided, a new lease with a valid stipulation for repairs. It rather appears, however, that the asserted termination of the old lease was based not on the theory that the making of the stipulation as to repairs was equivalent to the making and acceptance of a new lease, but rather on the theory that the notice to quit and the lessee's acquiescence therein effected a termination of the lease. But this would seem to involve a violation of the statute as to oral surrenders. The term surrender is not used in the opinion.

¹¹⁰ *Holmes v. Brunskill*, 3 Q. B. D. 495.

¹¹¹ *John v. Jenkins*, 1 *Crompt. & M.* 227; *Sheppard's Touchstone*, 301.

¹¹² *Sidebotham v. Holland* (1895), 1 Q. B. D. 378.

¹¹³ *Fenner v. Blake* (1900), 1 Q. B. D. 426. This case in effect overrules *Doe v. Johnston, McClel. & Y.* 141, though it makes no reference thereto.

that the landlord should have the option of terminating the lease by notice has been regarded as not involving the making of a new demise effecting a surrender,¹¹⁴ but it may be questioned whether such a modification of the possible length of the term can properly be regarded otherwise than as a new demise.

Not only is a surrender effected by operation of law on the lessee's acceptance of a new lease inconsistent with the previous lease to him, but this result also follows on his acceptance of any other interest in the premises inconsistent with such lease, as when "a lessee for years accepts a grant of a rent, common, estovers, herbage, or the like, for life or years, out of the same lands."¹¹⁵ It has even been decided that a tenant, by agreeing orally to thereafter hold, not as tenant, but merely as a servant of the lessor, thereby effects a surrender by operation of law.¹¹⁶ Since, however, as servant one takes no interest in the premises, it is somewhat difficult to perceive such an inconsistency between the new agreement and the pre-existing lease as to have this effect. The new agreement seems to involve in effect an oral surrender, invalid under the statute, accompanied by a contract as to the future personal relations of the parties.¹¹⁷ There are also decisions to the effect that a contract for the sale of the leased premises by the landlord to the tenant effects a surrender by operation of law.¹¹⁸ In England it has been decided that such a contract does not ordinarily have that effect, for the reason that it is impliedly subject to a condition that the vendor shall have a good title, the opinion being expressed, however, that a surrender would, in the absence of such a condition, result, as from a new demise, on the ground that one taking possession under a contract for the sale of land is a tenant at will,¹¹⁹ a view as to the effect of such holding which has been occasionally asserted there and in this country.¹²⁰

¹¹⁴ *Coe v. Hobby*, 72 N. Y. 141, 28 Am. Rep. 120.

¹¹⁵ Bac. Abr. tit. *Leases* (S.) 2, 1.

¹¹⁶ *Peter v. Kendal*, 6 B. & C. 703; *Lambert v. McDonnell*, 15 Ir. C. L. Rep. 136.

¹¹⁷ The cases cited appear not to be in accord with *Gybson v. Searls*, Cro. Jac. 84, 177, in which it was decided that there was no surrender of the lease of a manor as a result of the lessee's acceptance of the office of bailiff of the manor.

¹¹⁸ *Lewis v. Angermiller*, 89 Hun. 65, 35 N. Y. Supp. 69. This decision seems to be based largely, however, on the fact that this was what the parties intended. A similar decision is made in *Denison v. Wertz*, 7 Serg. & R. (Pa.) 372, without any discussion.

¹¹⁹ *Doe v. Stanion*, 1 M. & W. 695.

¹²⁰ See *Doe v. Chamberlaine*, 5 M. & W. 114; *Doe v. Caperton*, 9 C. & P. 112; *Rawson v. Babcock*, 40 Mich. 330; *Towne v. Butterfield*, 97 Mass. 105; *Dunham v. Townsend*, 110 Mass. 440; *Love v. Edmonston*, 1 Ired. L. (N. C.) 152; *Jones v. Jones*, 2 Rich. L. (S. C.) 542.

TRANSFER OF POSSESSION TO LANDLORD.

A second mode of surrender by operation of law, and one which frequently occurs, results upon the relinquishment of possession by the tenant and the resumption of possession by the landlord, whether this is by or without agreement between the parties.¹²¹ The theory of such a surrender would seem to be that the revesting of possession in the landlord to the exclusion of the tenant, by the action of both parties, being inconsistent with the continuance of an outstanding leasehold in the tenant, both are estopped to assert that the relation of landlord and tenant still exists. Such a surrender may be of either the whole or of merely a portion of the premises.¹²²

The question whether there is an agreement for such transfer of possession is, it seems, entirely immaterial. The tenant may give his landlord possession by agreement, but more frequently such a surrender occurs as a result of the abandonment of possession by the tenant, and the resumption of possession by the landlord, either for the sake of protecting the premises from injury, or of saving himself from loss owing to his inability to collect the rent from the tenant. That the landlord may thus take possession on the tenant's abandonment seems to be agreed,¹²³ but the abandonment must be of a permanent character, and the landlord cannot resume control merely because the tenant has temporarily vacated the premises.¹²⁴ On the other hand, the mere abandonment of possession by the tenant, however permanent he may intend it to be, cannot effect a surrender, relieving the tenant from his obligations under the lease, unless the landlord does presume possession.¹²⁵ The tenant may, by assigning to another, relieve himself from the obligations

¹²¹ See *Grimman v. Legge*, 8 B. & C. 324; *Dodd v. Acklom*, 6 M. & G. 672; *Phene v. Popplewell*, 12 C. B. N. S. 334; *Shehan v. Herzberg*, 73 Ala. 59; *Hart v. Pratt*, 19 Wash. 560; *Lamar v. McNamee*, 10 Gill. & J. (Md.) 116, 32 Am. Dec. 152; *Talbot v. Whipple*, 14 Allen (Mass.), 177; *Williams v. Jones*, 1 Bush. (Ky.) 621; *Prior v. Kiso*, 81 Mo. 241; *Graham v. Anderson*, 3 Har. (Del.) 364; *Elliott v. Aiken*, 45 N. H. 30; *Kelly v. Noxon*, 64 Hun., 18 N. Y. Supp. 909; *Elgutter v. Drishaus*, 44 Neb. 378.

¹²² See *Hewitt v. Hornbuckle*, 97 Ill. 97; *Smith v. Pendergast*, 26 Minn. 318; *Bless v. Jenkins*, 129 Mo. 647; *Peters v. Newkirk*, 6 Cow. (N. Y.) 103.

¹²³ See *Packer v. Cockayne*, 3 G. Greene (Iowa), 111; *Haller v. Squire*, 91 Iowa, 10; *Kiplinger v. Greene*, 61 Mich. 340, 1 Am. St. Rep. 584; *Torrans v. Stricklin*, 52 N. C. 50; *Pier v. Carr*, 69 Pa. St. 326; *Zigler v. McClellan*, 15 Oreg. 499.

¹²⁴ *Larkins v. Avery*, 23 Conn. 304; *Hough v. Wood*, 104 Mich. 109; *McKinney v. Reader*, 7 Watts (Pa.), 123; *Chancy v. Smith*, 25 W. Va. 404, 52 Am. Rep. 217.

¹²⁵ *Meyer v. Smith*, 33 Ark. 627; *Lockwood v. Lockwood*, 22 Conn. 425; *Stobie v. Dills*, 62 Ill. 433; *Biggs v. Stueler*, 93 Md. 100; *Rollins v. Moody*, 72 Me. 135; *Huntingdon v. Parkhurst*, 87 Mich. 38, 24 Am. St. Rep. 146; *Lucy v. Watkins*, 33 Minn. 441; *Kerr v. Clark*, 19 Mo. 132; *Laughran v. Smith*, 75 N. Y. 205; *Reeves v. McComesky*, 168 Pa. St. 571; *Barlow v. Wainwright*, 22 Vt. 88, 53 Am. Dec. 79.

arising out of privity of estate, but not those arising from privity of contract, and he can relieve himself from neither by merely leaving the premises, without any action on the part of the landlord. This principle is sometimes asserted by a statement that a surrender is invalid or nugatory unless accepted by the landlord, but this, it is to be observed, involves a use of the word "surrender" in its non-technical sense, before referred to, of a relinquishment of possession, as distinguished from its technical sense of a yielding up of the leasehold estate. Indeed, in England and presumably in a number of states in this country, as before stated, a surrender, using the term in its technical sense, if express, is valid, though not accepted, until repudiated by the person to whom made. Such a use of the term surrender in its non-technical sense, of abandonment, or relinquishment of possession, with the corresponding use of the word "acceptance" as meaning resumption of possession by the landlord, is extremely frequent in connection with that mode of surrender by operation of law which we are now discussing, with the unfortunate result of tending to obscure both the proper meaning of the term and the nature of such surrender by operation of law.

The resumption of possession may be by another person on behalf of the landlord, provided he has authority for this purpose, and the effect is the same as if it were by the landlord directly.¹²⁶ This is sometimes expressed by saying that a surrender may be made to an agent of the landlord, or may be accepted by such agent, but this again involves the use of the term surrender in the non-technical sense above referred to. A surrender, using the term in its technical sense, cannot of course be made to any person other than the landlord, since he alone has the reversion. An agent merely authorized to collect rent for the landlord has no authority, it has been decided, to thus resume possession in his behalf.¹²⁷

A question frequently arises as to what constitutes a resumption of possession by the landlord, on the abandonment of the premises by the tenant, sufficient to effect a surrender. It may be necessary for the landlord to assume some measure of control over the property to protect it from injury, or he may desire to utilize it in order to recoup himself for the loss of the stipulated rent, and yet in neither of these cases does he usually desire to preclude himself from asserting personal liability on the covenant for the payment

¹²⁶ *Paget v. Electrical Engineering Co.*, 85 Minn. 844; *Blake v. Dick*, 15 Mont. 236, 48 Am. St. Rep. 671; *Peche v. Sloane*, 16 N. Y. App. D. W. 458; *Morat v. Falkenhagen*, 148 Pa. St. 393; *Lovejoy v. McCarty*, 94 Wis. 341; *Hart v. Pratt*, 19 Wash. 560; *Amory v. Kannofsky*, 117 Mass. 351, 19 Am. Rep. 416.

¹²⁷ *Blake v. Dick*, 15 Mont. 236; *Woodward v. Lindley*, 43 Ind. 333.

of rent. The fact that the landlord enters and cares for the premises after the tenant's abandonment is not regarded as showing a resumption of exclusive possession, effecting a surrender,¹²⁸ nor does the making of repairs in itself have that effect.¹²⁹ The question is whether the possession taken by him is of an exclusive character, with the apparent intention of occupying and controlling the premises as his own, to the exclusion of the tenant, in case the latter desires to return,¹³⁰ and this is ordinarily a question of fact.¹³¹

When the tenant, upon abandoning the premises, sends the key to the landlord, the fact that the latter accepts and retains it, instead of sending it back, does not necessarily show a resumption by him of exclusive possession, so as to effect a surrender.¹³²⁻¹³³ And the case is the same when the key is left at the landlord's residence or place of business,¹³⁴ or is given by the tenant to a third person, who is not authorized to receive it for him, so that the landlord must either take charge of it or run the risk of its loss.¹³⁵ The fact that the landlord, at the time of obtaining or accepting control of the key, or previously thereto, states or explicitly shows that he has no intention of regarding the tenancy as terminated, or of releasing the tenant from his obligations under the lease, is sufficient of itself to prevent such result.¹³⁶⁻¹³⁷ But on the other hand the acceptance

¹²⁸ *Joslin v. McLean*, 99 Mich. 480; *Duffy v. Day*, 42 Mo. App. 638; *Breuckman v. Turbell*, 89 Pa. 58; *Requa v. Domestic Pub. Co.*, 11 N. Y. Misc. 322, 32 N. Y. Supp. 125. So the cleaning of the windows by the landlord has been decided not to have such an effect. *Milling v. Becker*, 96 Pa. 182.

¹²⁹ *Cook v. Anderson*, 85 Ala. 99; *Haynes v. Aldrich*, 133 N. Y. 287, 28 Am. St. Rep. 636; *Brewer v. National Union Building Ass'n*, 166 Ill. 221; *Livermore v. Eddy*, 33 Mo. 547; *Pier v. Carr*, 69 Pa. 326; *Texas Loan Agency v. Fleming*, 92 Tex. 458.

¹³⁰ *Welcome v. Hess*, 90 Cal. 507, 25 Am. St. Rep. 145; *Duffy v. Day*, 42 Mo. App. 638; *Meeker v. Spalsbury*, 66 N. J. L. 60.

¹³¹ *Brewer v. National Union Building Ass'n*, 166 Ill. 221; *Lafferty v. Hawes*, 63 Minn. 13; *Carson v. Arvantes*, 10 Col. App. 382; *Armour Packing Co. v. Des Moines Pork Co.*, 116 Iowa 723; *Wood v. Wely*, 40 N. Y. App. Div. 202, 57 N. Y. Supp. 721; *Underhill v. Collins*, 32 N. Y. St. Rep. 961, 10 N. Y. Supp. 680; *White v. Barry*, R. I. 52 Atl. 682; *Hart v. Pratt*, 19 Wash. 560; *Kneeland v. Schmidt*, 78 Wis. 345; *Reeve v. Bird*, 1 C. M. & R. 31.

¹³²⁻¹³³ *Thomas v. Nelson*, 69 N. Y. 118; *Withers v. Larrabee*, 48 Me. 570; *Joslin v. McLean*, 99 Mich. 480; *Ledsinger v. Burke*, 113 Ga. 74; *Prentiss v. Warne*, 10 Mo. 601; *Buck v. Lewis*, 46 Mo. App. 227; *Martin v. Stearns*, 52 Iowa, 345; *Ladd v. Smith*, 6 Oreg. 316; *Milling v. Becker*, 96 Pa. 182; *Newton v. Speare Laundering Co.*, 19 R. I. 546.

¹³⁴ *Underhill v. Collins*, 132 N. Y. 269; *Lucy v. Wilkins*, 33 Minn. 441; *Tolle v. Orth*, 75 Ind. 298, 39 Am. Rep. 147.

¹³⁵ *Lucy v. Wilkins*, 33 Minn. 441; *Douglas v. Seiferd*, 18 Misc. Rep. 188, 41 N. Y. Supp. 289; *Barkley v. McCue*, 25 Misc. Rep. 738, 55 N. Y. Supp. 608; *Blake v. Dick*, 15 Mont. 236, 48 Am. St. Rep. 271; *Lane v. Nelson*, 167 Pa. St. 602.

¹³⁶⁻¹³⁷ *Withers v. Larrabee*, 48 Me. 570; *Scott v. Beecher*, 91 Mich. 590; *Aner v. Penn*, 99 Pa. St. 370, 44 Am. Rep. 114; *Morgan v. Smith*, 70 N. Y. 537; *Townsend v. Albers*, 3 E. D. Smith (N. Y.), 560; *Spies v. Voss*, 30 N. Y. St. Rep. 548, 9 N. Y. Supp. 532; *Dorrance v. Bonesteel*, 51 N. Y. App. Div. 129, 64 N. Y. Supp. 307; *Bowen v. Clarke*, 22 Oreg. 566, 29 Am. St. Rep. 625; *Nelson v. Thompson*, 23 Minn. 508.

of the key may be considered with other facts as tending to show a resumption of possession by the landlord, and a consequent termination of the tenancy.¹³⁸ And the fact that after abandonment by the tenant the landlord asked him for the key, and retained it, has been regarded as conclusively showing a resumption of exclusive possession.¹³⁹

That the landlord, after the tenant's abandonment of the premises, makes efforts, by posting notices or otherwise, to make a lease to another does not of itself show a resumption of possession terminating the tenancy,¹⁴⁰ nor does the fact that such efforts are accompanied by assertions on his part that the tenant has given up his lease have that effect.¹⁴¹ And a like view has been taken of his action in offering the premises for sale, with the right in the purchaser to immediate possession.¹⁴²

The question whether, upon the tenant's abandonment of the premises, the landlord may lease them to another without thereby causing a surrender of the lease, and consequent termination of the tenant's liability for rent, is one of great practical interest, upon which the authorities are not in accord. There are a number of decisions to the effect that the landlord may so "re-let" to another and still hold the former tenant.¹⁴³ By others it is regarded as necessary, in order that such re-letting shall not effect a surrender, that the landlord, before making the new lease, inform the tenant that he is about to do so on the latter's account, that is, that the purpose is to reduce, but not necessarily to extinguish, the latter's

¹³⁸ *Elliott v. Aiken*, 45 N. H. 30; *Hesseltine v. Seavey*, 16 Me. 212; *Buckingham Apartment House Co. v. Defoe*, 78 Minn. 268; *Hegelman v. McArthur*, 1 E. D. Smith (N. Y.), 147; *Bowen v. Clarke*, 22 Oreg. 566, 29 Am. St. Rep. 625; *Brewer v. National Union Building Ass'n*, 166 Ill. 221.

¹³⁹ *Harris v. Dub*, 57 Ga. 77; *Ledsinger v. Burke*, 113 Ga. 74.

¹⁴⁰ *Walls v. Atchison*, 3 Bing. 462; *Oastler v. Henderson*, 2 Q. B. Div. 575; *Gaines v. McAdam*, 79 Ill. App. 201; *Vincent v. Frelich*, 50 La. Ann. 378, 69 Am. St. Rep. 436; *Scott v. Beecher*, 91 Mich. 590; *Joslin v. McLean*, 99 Mich. 48; *Buck v. Lewis*, 46 Mo. App. 227; *Blake v. Dick*, 15 Mont. 236, 48 Am. St. Rep. 671; *Haynes v. Aldrich*, 133 N. Y. 287, 28 Am. St. Rep. 636; *Dorrance v. Bonesteel*, 51 N. Y. App. Div. 129, 64 N. Y. Supp. 307; *Lane v. Nelson*, 167 Pa. St. 602.

¹⁴¹ *Milling v. Becker*, 96 Pa. St. 182; *Gaines v. McAdam*, 79 Ill. App. 201.

¹⁴² *Reeves v. McComeskey*, 168 Pa. St. 571.

¹⁴³ *Aner v. Penn*, 99 Pa. St. 370, 44 Am. Rep. 114; *Brady v. Walker*, 93 Ill. App. 609; *Humiston v. Wheeler*, 175 Ill. 514; *Marshall v. John Grosse Clothing Co.*, 184 Ill. 421, 75 Am. St. Rep. 181; *Martin v. Stearns*, 52 Iowa, 345; *Stewart v. Sprague*, 71 Mich. 50, 76 Mich. 184; *Bowen v. Clarke*, 22 Oreg. 566, 29 Am. St. Rep. 625; *Merrill v. Willis*, 51 Neb. 162; *Schielly v. Koch*, 119 N. C. 80; and see *Brown v. Cairns*, 63 Kan. 584. That the landlord allowed persons to occupy the abandoned premises temporarily without paying rent was decided not to put an end to the tenancy. *Hardison Whiskey Co. v. Lewis*, 114 Ga. 602.

liability for rent.¹⁴⁴ By still another line of decisions it is adjudged that the re-letting will terminate the liabilities under the previous lease, without any suggestion being made that a notice to the previous tenant would prevent this result.¹⁴⁵ In two quite recent cases it is decided that a written notice by the landlord of his intention to re-let, to which the tenant fails to reply, can not be regarded as sufficient to prevent the operation of such a re-letting as a resumption of exclusive possession, since there is in such case no element of assent by the tenant to a re-letting.¹⁴⁶ In case the re-letting is regarded as showing a resumption of the possession, the surrender is to be regarded as taking place, not at the time of the tenant's relinquishment of possession but at the time of the relinquishment.¹⁴⁷

In reference to this question of the effect of such re-letting by the landlord to a third person, as being equivalent to a resumption of the possession of the premises, it may be said that, while it seems fair that, if a tenant abandons the premises, and is either not accessible to suit, or is of doubtful pecuniary responsibility, the landlord should have the privilege of avoiding a possible loss of the whole rent by leasing to another, without thereby precluding himself from recovering from the original tenant any deficiency yet remaining, it is difficult to harmonize such a view with well settled legal principles. The landlord's undertaking to lease to another, without the former tenant's consent, is necessarily an assumption of absolute control of the premises, excluding any rights of possession in the other. The landlord, by giving the second lease, in effect asserts that he alone is entitled to control the possession of the premises. Furthermore, looking at the matter from a somewhat different standpoint, it is necessary, if the second lease, given without the tenant's consent, is to be regarded as valid to confer present rights of possession, that the operation of the former lease shall have come

¹⁴⁴ *Brown v. Cairns*, 107 Iowa, 727; *Alsop v. Banks*, 68 Miss. 664, 24 Am. St. Rep. 294; *Brown v. Cairns*, 63 Kan. 584 (semble); *Williamson v. Crossett*, 62 Ark. 393; *Hayes v. Goldman* (Ark.), 72 S. W. 559. There is a *dictum* to the effect that a notice would be effectual for this purpose, in *Walls v. Atcheson*, 3 Bing, 462.

¹⁴⁵ *Oastler v. Henderson*, 2 Q. B. Div. 575; *Welcome v. Hess*, 90 Cal. 507, 25 Am. St. Rep. 145, distinguishing *Respini v. Porta*, 89 Cal. 464, 23 Am. St. Rep. 488; *Rice v. Dudley*, 65 Ala. 68; *Hesseltine v. Seavey*, 16 Me. 212; *Matthews v. Tobener*, 39 Mo. 115; *Pelton v. Place*, 71 Vt. 430; *Wilton v. Watry*, 31 Wis. 638.

¹⁴⁶ *Gray v. Kaufman Dairy & Ice Cream Co.*, 162 N. Y. 388, 49 L. R. A. 580; *Briggs v. Stueler*, 93 Md. 100. In the first of the above cases the court distinguishes the case of *Underhill v. Collins*, 132 N. Y. 269, on the ground not only that there the communication of the landlord's purpose was verbal, but also, it seems, on the ground that it was previous to the tenant's abandonment, and that such abandonment was in effect an acceptance of the landlord's proposition to relet for account of the tenant.

¹⁴⁷ *Oastler v. Henderson*, 2 Q. B. Div. 575; *Schusler v. Ames*, 16 Ala. 73; *Marseilles v. Kerr*, 6 Whart. (Pa.) 500.

to an end, since two distinct persons cannot each be entitled to the exclusive possession of the same premises. As has been remarked in this connection, "if the former tenant bring ejectment against the new tenant, what defense can the new tenant have—except that the plaintiff's right has ceased?"¹⁴⁸ In what has been said above it is assumed that the re-letting is without the consent of the former tenant. The cases which assert that the re-letting does not result in a surrender seem generally to be based on the view that since this is for the tenant's benefit, as reducing his liability for rent, his assent thereto is to be presumed, and this is no doubt the view of those cases which assert the landlord's right to re-let provided he first notify the tenant. But there is nothing in the nature of their relations from which any authority in the landlord thus to make an assignment or sublease for the tenant can be inferred, nor can such inference properly be drawn from the fact that the tenant has vacated the premises or that the landlord notifies the tenant of his purpose to act for him. Even the tenant's express consent to the making of a new lease by the landlord cannot well deprive such action on the latter's part of the effect of a resumption of possession by him, unless the re-letting is to be regarded as merely on behalf of the tenant, in which case it can take effect only as a sublease or assignment of the existing leasehold, since that is all which is within the tenant's control. The only alternative seems to be to regard the transaction as a substitution of a new tenant by agreement, accompanied by a transfer of possession, and this, as we shall presently see, in itself effects a surrender by operation of law. As regards the question of fairness to the landlord, there seems no more reason that the tenant's abandonment of the premises should give the landlord a right to re-let than that his mere default in performance of his covenants, without abandonment, should have that effect, and that the latter is not the case, in the absence of a statute or express provision in the lease authorizing a forfeiture, is unquestionable. In either case, that of a default in rent accompanied by abandonment, or that of a default in rent alone, it may be desirable for the landlord that he be able to get rent for the premises from another tenant, without terminating the liability of the previous tenant. This he may do, it has been decided, under an express provision in the lease reserving the tenant's personal liability for the sums reserved as rent, even after forfeiture for non-payment.¹⁴⁹ Likewise the lease may, it appears, validly provide that, upon the

¹⁴⁸ *Welcome v. Hess*, 90 Cal. 507, 25 Am. St. Rep. 145.

¹⁴⁹ *Grommes v. St. Paul Trust Co.*, 147 Ill. 634, 36 Am. St. Rep. 238; *Hall v. Gould*, 13 N. Y. 127.

premises becoming vacant, the landlord may re-enter and re-let, and apply the rent so received upon the rent reserved under the first lease,¹⁵⁰ the liability of the former tenant being thus retained in spite of the new lease. Such a provision is to be upheld, apparently, on the theory that the landlord is thereby made agent for the tenant to make an assignment or sublease on behalf of the latter, in case of the latter's vacation of the premises, or perhaps on the theory that the first lease is terminated by the vacation and re-entry. On the latter theory, the tenant's continuing liability for the sums thereafter becoming due is not, strictly speaking, a liability for rent, but is purely contractual in character.

Without reference to any subsequent resumption of possession by the landlord, it is sufficient, according to some cases, that the abandonment or relinquishment of possession by the tenant be in accordance with a previous demand or request for possession by the landlord, it thus being immaterial whether the landlord's expression of assent to the relinquishment is previous to or after its occurrence.¹⁵¹ It is on this theory, it seems, that when the landlord told the tenant that he wished to erect a building on the land, and, the tenant making no objection, the building was erected, the facts were decided to constitute a surrender as to the part of the land occupied by the building.¹⁵² On the other hand, it has been held that a mere statement by the landlord that if the tenant, who had desired to be relieved from the lease, would move out immediately, to which the tenant replied merely that he would "see what he could do," did not justify the tenant in moving out two days later, and asserting a surrender.¹⁵³ And a notice to the tenant to move "on or before" the last day of the term cannot be regarded as a continuing offer to accept the premises at any time at which the tenant may choose to leave.¹⁵⁴

The fact that the landlord authorized the tenant to quit possession and that the latter thereupon did quit has been decided not to effect

¹⁵⁰ *Jones v. Rushmore*, 67 N. J. L. 157; *Hurley v. Schring*, 43 N. Y. St. Rep. 240, 17 N. Y. Supp. 7; *Ogden v. Rowe*, 3 E. D. Smith (N. Y.), 312; *James v. Coe*, 32 Misc. 674, 66 N. Y. Supp. 509; *McElroy v. Brooks*, 104 Ill. App. 220. But *Schwartz v. Brucato*, 57 App. Div. 202, 68 N. Y. Supp. 289, is to the effect, apparently, that in spite of such a provision, the re-letting terminates the lease. In that case, the landlord re-let, giving possession to the new lessee a few days before the time at which the latter was to begin to pay rent, as an inducement to take the lease, and it was held that the former tenant was discharged from the time of such entry by the new lessee.

¹⁵¹ *Boyd v. George* (Neb.), 89 N. W. 271; *Conklin v. Tuttle*, 52 Mich. 630; *Patchin v. Dickerman*, 31 Vt. 666; *Crane v. Edwards*, 80 App. Div. 747, 80 N. Y. Supp. 747 (semble)

¹⁵² *Smith v. Pendergast*, 26 Minn. 318.

¹⁵³ *Kelly v. Noxon*, 64 Hun. 281, 18 N. Y. Supp. 909.

¹⁵⁴ *Koehler v. Scheider*, 16 Daly (N. Y.) 235, 10 N. Y. Supp. 101.

a surrender of the leasehold.¹⁵⁵ There seems, however, little distinction in principle in this regard between a request to the tenant to quit and a permission to quit, and, presumably, in these jurisdictions, the tenant could not assert a surrender even though he yielded possession on a demand therefor.

NEW LEASE TO THIRD PERSON.

A third mode of surrender by operation of law occurs in the case of a new lease by the landlord to a third person, accompanied by the former tenant's relinquishment of possession in favor of such third person. The question whether such a new lease and relinquishment of possession would thus operate was at one time the subject of considerable question in England,¹⁵⁶ but, by later cases there, seems to be regarded as settled that, where a tenant assents to the making of a lease to another, and yields possession to the new lessee, there is a surrender by operation of law,¹⁵⁷ the theory thereof being explained as follows: "As far as the landlord is concerned, he has created an estate in the new tenant which he is estopped from disputing with him, and which is inconsistent with the continuance of the tenant's term. As far as the new tenant is concerned, the same is true. As far as the owner of the particular estate in question is concerned, he has been an active party in this transaction, not merely by consenting to the creation of the new relation between the landlord and the new tenant, but by giving up possession and so enabling the new tenant to enter."¹⁵⁸ In this country likewise, it has been stated that "an unconditional agreement between a landlord and a third person, with the assent of the tenant, during the term, to rent the premises to such third person, followed by a change of possession and the payment of rent by the tenant, will amount to a valid surrender of the old lease, and an acceptance thereof on the part of the landlord,"¹⁵⁹ and approximately

¹⁵⁵ *Felker v. Richardson*, 67 N. H. 509; *Wittaker v. Barker*, 1 Cr. & M. 113; *Lamar v. McNamee*, 10 G. & J. (Md.) 116. But *Stanley v. Koehler*, 1 Hilt. (N. Y.) 354, seems to be *contra*.

¹⁵⁶ See *Lyon v. Reed*, 13 M. & W. 285, and the full statement of the English cases in the notes to the *Duchess of Kingston's Case* in 2 Smith's *Leading Cases* (8th Amer. ed., p. 798 et seq.)

¹⁵⁷ *Nickells v. Atherstone*, 10 Q. B. 944; *Davison v. Gent*, 1 H. & N. 744.

¹⁵⁸ Per Denman, C. J., in *Nickells v. Atherstone*, 10 Q. B. 944.

¹⁵⁹ *Morgan v. McCollister*, 110 Ala. 319; *Hoerd v. Hahne*, 91 Ill. App. 514. The statement was quoted from Taylor, *Landlord and Tenant*, § 509, where *Whitney v. Myers*, 1 Duer. (N. Y.) 266, is cited as authority. In this case it is said that if it was agreed between the lessor, the lessee, and a third person, that the former would accept the third person as tenant in lieu of the lessee for the residue of the term, and accept rent from him monthly, in advance instead of quarterly, as provided in the lease, and if this agree-

similar statements have been made.¹⁶⁰ In one state the courts have questioned the validity of such a mode of surrender, without, however, positively deciding the question.¹⁶¹

The new lease to a third person need not be for any particular term, nor need it be in writing or even in express words, it being apparently sufficient that the landlord accept a third person as tenant in place of the prior tenant, with the intent that he shall hold under a new demise and not as the successor of the prior tenant under the former demise.¹⁶² The question whether there is such a tacit demise to a third person has most frequently arisen in this country in connection with an attempt to assert a personal liability on the part of a lessee who has assigned his leasehold interest to another. Though an assignee succeeds to the rights and liabilities of the lessee, the lessee still remains liable, as is well recognized, on those obligations growing out of privity of contract, such as an express covenant to pay rent, and this liability continues so long as the lease remains operative. But this liability ceases if the leasehold is surrendered, and a surrender not infrequently occurs, under the principle which we are now discussing, as a result of the landlord's tacit recognition of the assignee of the leasehold, to whom the lessee has transferred possession, as holding, not under the pre-existing lease, but under a new demise. This is sometimes expressed by saying that the lessee is relieved from liability if the landlord accepts the assignee "as his tenant," but this is evidently incorrect,¹⁶⁴ since the most ordinary manifestation of such acceptance of the assignee as tenant, that is, receiving rent from him, does not, as we shall presently see, result in a surrender, or alter the original lessee's

ment was carried out by the former lessee yielding possession to such third person, and by the latter taking possession, and paying rent accordingly, and the latter accepting rent from him, there was a surrender by operation of law, citing *Bailey v. Delaplaine*, 1 Sandf. (N. Y.) 5, where the lessor in chief called on the sublessor to pay the rent, producing the sublease, on which was endorsed an order by the sublessor to pay the rent to the lessor in chief, and forbade the sublessee to pay any more rent to the sublessor, saying that he had taken the latter's place, and he collected the rent under the sublease accordingly, and this was regarded as a surrender of the sublease by operation of law.

¹⁶⁰ *Clemens v. Broomfield*, 19 Mo. 118; *Williams v. Vanderbilt*, 145 Ill. 238, 36 Am. St. Rep. 486; *Dills v. Stobie*, 81 Ill. 202.

¹⁶¹ See *Hunt v. Gardner*, 39 N. J. L. 533; *Decker v. Hartshorn*, 60 N. J. L. 548.

¹⁶² See *Thomas v. Cooke*, 2 B. & Ald. 119; *Amory v. Kannoffsky*, 117 Mass. 351, 19 Am. Rep. 416; *Colton v. Gorham*, 72 Iowa 324; *Fry v. Partridge*, 73 Ill. 634; *Clemens v. Broomfield*, 19 Mo. 118; *Hutcheson v. Jones*, 79 Mo. 496; *Logan v. Anderson*, 2 Doug. (Mich.) 101; *Bowen v. Haskell*, 53 Minn. 480; *Wallace v. Kennelly*, 47 N. J. L. 242; *Creveling v. De Hart*, 54 N. J. L. 338; *Vandekar v. Reeves*, 40 Hun. (N. Y.) 430; *Dills v. Stobie*, 81 Ill. 202; *Kinsey v. Minnick*, 43 Md. 112; *People's Bank v. Alexander*, 140 Pa. St. 22.

¹⁶⁴ The incorrectness of such a statement is well shown in the able article on "The Rights of Assignment and Underlease," by Joseph Willard, Esq., in 7 *Am. Law Review*, 240.

liabilities or his covenants. The landlord must accept the assignee, not as a tenant, but as a new lessee, in order to effect a surrender. Otherwise a surrender would almost invariably follow upon the assignment of a term. Not only may a surrender thus result from a new demise to the assignee of the tenant, but it may result from a new demise to his sublessee, that is, from the recognition of the sublessee by the landlord as holding directly from himself.¹⁶⁵

The question whether the landlord has thus made a new demise to a third person is ordinarily a question of fact.¹⁶⁶ It is recognized, however, by practically all the courts, that the landlord's acceptance of rent from one in possession of the premises under an assignment from the previous tenant does not show a new demise to such person.¹⁶⁷ Were it otherwise, it is evident, the landlord, in order to preserve his rights against the original lessee, would always have to demand and collect the rent of the latter and not of the person in enjoyment of the profits of the land. A finding of a new demise has, however, been regarded as justified when the lessor accepted rent from the lessee's assignee, made repairs at his request, and, on his abandonment of the premises, bought his personal property on the premises, crediting the price on the rent, and made no demand on the lessee till after the end of the term.¹⁶⁸ And likewise the facts that, the lessee having disposed of an undivided interest in the premises to another, he paid one-half only of the rent subsequently due, and referred the lessor to such other for the other

¹⁶⁵ *Thomas v. Cooke*, 2 B. & Ald., 119; *Stimmel v. Waters*, 2 Bush (Ky.), 282; *Amory v. Kannoffsky*, 117 Mass. 351, 19 Am. Rep. 416; *Snyder v. Parker*, 75 Mo. App. 529; *Bailey v. Delaplaine*, 1 Sandf. (N. Y.) 5; *Dills v. Stobie*, 81 Ill. 202. In *Whicher v. Cottrell*, 165 Mass. 351, it is said that the fact that the landlord in that case received rent from the lessee's vendee did not effect a termination of the tenancy, since the lessor continued to claim the lessee as tenant and made out bills for rent against him. But, it is submitted, the fact that the lessor claims the original lessee as tenant and makes out bills against him is immaterial. He does not lose his rights against the lessee by recognizing the latter's assignee as tenant and demanding rent from him any more than he does by accepting rent from him. In the case in question the tenancy was one at will, and it would seem that, under the former decisions of that court, the mere transfer of possession by the lessee would terminate the tenancy so soon as the lessor knew thereof. See *Cooper v. Adams*, 6 Cush. 987; *King v. Lawson*, 98 Mass. 309; *Clark v. Wheelock*, 99 Mass. 14; *Coughlin v. Gray*, 131 Mass. 56; *Hart v. Bouton*, 152 Mass. 440. But this is not suggested in the opinion.

¹⁶⁶ *Woodcock v. Nuth*, 8 Bing. 170; *Thomas v. Cook*, 2 B. & Ald. 119; *Nickells v. Atherstone*, 10 Q. B. 944; *Fry v. Partridge*, 73 Ill. 51; *Wallace v. Kennelly*, 47 N. J. L. 242; *Logan v. Anderson*, 140 Pa. St. 22; *Dietz v. Kucks* (Cal.), 45 Pac. 832.

¹⁶⁷ *Copeland v. Watts*, 1 Stark. 95; *Bonetti v. Treat*, 91 Cal. 233; *Grommes v. St. Paul Trust Co.*, 147 Ill. 634, 36 Am. St. Rep. 248; *Bradley v. Walker*, 93 Ill. App. 609; *Harris v. Heckman*, 62 Ill. 411; *Detroit Pharmacal Co. v. Burt*, 124 Mich. 220; *Jones v. Barnes*, 45 Mo. App. 590; *Brewer v. Dyer*, 7 Cush. (Mass.) 337; *Edwards v. Spalding*, 20 Mont. 54, 60; *Rees v. Lowry*, 57 Minn. 381; *Bouscaren v. Brown*, 40 Neb. 722; *Hunt v. Gardner*, 39 N. J. L. 530; *Wilson v. Lester*, 64 Barb. 431; *Wallace v. Dinning*, 11 Misc. Rep. 317, 32 N. Y. Supp. 159; *Frank v. McGuire*, 42 Pa. St. 77; *Adams v. Burke*, 21 R. I. 126.

¹⁶⁸ *Colton v. Gorham*, 72 Iowa, 234.

half, and that all subsequent bills for rent were thereafter made out one-half against such other, who paid accordingly, were regarded as sufficient evidence of a surrender as to one-half the premises.¹⁶⁹ The action of the landlord in suing the lessee's assignee on the covenant for rent in the lease, at the instigation of the lessee, has been decided not to show an election to accept the assignee as lessee.¹⁷⁰ In this last case there is a *dictum* that if such an action against the assignee be brought by the landlord "of his own motion," it might perhaps show such an election. But it seems very questionable whether such an effect should in any case be given to the mere bringing of an action against the assignee on the covenant for rent. It has been the law for many years that the landlord may sue either the lessee or his assignee on such a covenant, or may sue both of them,¹⁷¹ and it has never before been suggested that by first suing the assignee he loses the right to sue the lessee. Indeed, the fact that he sues on the covenant in the lease would seem of itself to be strong evidence that he regarded the original lease as still in existence. The giving of a receipt for rent by the landlord in the name of the person to whom the possession has been transferred has been said to be evidence of a recognition of him as lessee,¹⁷² but this is not conclusive,¹⁷³ and it would seem to be entitled to but little weight, when such person is the lessee's assignee, since the receipt would naturally be given to the person who is under a primary obligation to pay the rent and who pays it.¹⁷⁴ That a receipt for rent given to the assignee recites that the letting is for a month only, while the original lease was for a longer time, is evidence, as against the landlord, of a new demise,¹⁷⁵ and in one case this effect seems to have been given to an agreement with the new tenant making the rent payable monthly instead of quarterly as in the original lease.¹⁷⁶ As the landlord's acceptance of rent from an assignee does not of itself establish a new demise, so the acceptance by the chief landlord of rent from a subtenant does not have that effect.¹⁷⁷ But it has been decided that there was a surrender of the

¹⁶⁹ *Fry v. Partridge*, 73 Ill. 51.

¹⁷⁰ *Whitcomb v. Cummings*, 68 N. H. 67.

¹⁷¹ See *Brett v. Cumberland*, Cro. Jac. 521; *Bachelour v. Gage*, Cro. Car. 188; *Sutliff v. Atwood*, 15 Ohio St. 186; *Whetstone v. McCartney*, 32 Mo. App. 430.

¹⁷² *Laurence v. Faux*, 2 Fost. & Fin. 435.

¹⁷³ *Graham v. Whichelo*, 1 Cr. & M. 188.

¹⁷⁴ See *Detroit Pharmacal Co. v. Burt*, 124 Mich. 220; *Wilson v. Lester*, 64 Barb. 431.

¹⁷⁵ *Wallace v. Kennelly*, 47 N. J. L. 242.

¹⁷⁶ *Murray v. Shave*, 2 Duer. (N. Y.) 182.

¹⁷⁷ *Decker v. Hartshorn*, 60 N. J. L. 548; *Lovejoy v. McCarty*, 94 Wis. 341; *Holman v. De Lin-River-Finley Co.*, 30 Or. 428; *Bacon v. Brown*, 9 Conn. 334; *Ballou v. Baxter*, 28 N. Y. St. Rep. 431, 8 N. Y. Supp. 15; *Bless v. Jenkins*, 129 Mo. 647; *Doe v. Wood*, 14 M. & W. 682.

leasehold created by the original lease when the tenant told the landlord that if the latter accepted rent from the subtenant, he must release him, the tenant, and, the landlord, having stated that he would continue to take rent from the subtenant and that the tenant could give up his lease, the tenant thereupon delivered his written lease to the landlord, who receipted therefor, and thereafter was paid his rent by the former subtenant,¹⁷⁸ and a surrender was also regarded as shown by the fact that, the original lessor having produced the sublease, on which was endorsed an order by the sublessor on the subtenant to pay the rent to the lessor, and saying that he had taken the sublessor's place, demanded that the subtenant pay the rent to him, and it was so paid as it became due.¹⁷⁹

The principle that the acceptance of rent from a new tenant in possession does not effect a surrender of the original leasehold has also been applied in the case of a change of tenants consequent upon a change in the membership of a firm, to the original members of which the lease was made.¹⁸⁰

The general statements of the doctrine of surrender as a result of a lease to a third person, both in the English and American cases, ordinarily assert the requirement not only of a new lease to a third person, but also of the existing tenant's assent thereto, as well as of a subsequent transfer of possession by such tenant to the new lessee. But the doctrine, or one closely analogous thereto, has been applied in the absence of any express assent by the prior tenant to the making of the new lease, and also when there was no transfer of possession by the tenant to the new lessee after the making of the new lease.

In a leading English case on this branch of the law,¹⁸¹ in which it was decided that where an undertenant in possession was accepted by the chief landlord as his tenant, with the assent of his former tenant, the sublessor, there was a surrender by operation of law of the latter's interest in the premises, the question whether the original tenant assented to the acceptance of the subtenant as tenant in his place was left to the jury, and a finding of such assent was regarded as justified, on the ground that such assent was clearly for his benefit, presumably because he was thereby relieved from his liability for rent. In other cases it was decided that the prior

¹⁷⁸ *Amory v. Kannoisky*, 117 Mass. 351, 19 Am. Rep. 416.

¹⁷⁹ *Bailey v. Delaplaine*, 1 Sandf. (N. Y.) 5.

¹⁸⁰ *Graham v. Whichelo*, 1 Cr. & M. 188; *Beall v. White*, 94 U. S. 382; *Laughran v. Smith*, 75 N. Y. 205; *Doty v. Gillett*, 43 Mich. 203. *Kinney v. Minnick*, 43 Md. 112, seems to be *contra*. But here the question was merely of the liability of the members of the new firm for rent, and the statement as to surrender is apparently a mere *dictum*.

¹⁸¹ *Thomas v. Cook*, 2 B. & Ald. 119.

tenant's consent to the making of a new demise to one to whom he had previously transferred the possession of the premises might be inferred from the possession of the original lease by the latter,¹⁸² or from the landlord's possession of the original lease, in a cancelled condition, this being in accordance with the usage of the landlord in case of a renewal of a lease.¹⁸³ In those cases in this country in which a surrender by operation of law has been recognized as resulting from the acceptance of an assignee of the leasehold, or of a subtenant, as holding under a new demise, there is quite frequently no express assent on the part of the previous tenant, the assignor or sublessor, to the new demise, but his assent, if it is to be regarded as essential to such a surrender, must in such a case be inferred from his transfer of possession to his assignee or sublessee, and from the fact, if he is the original lessee, that he will be thereby freed from liability on the lease. As regards the requirement of a transfer of possession by the original tenant to the new lessee, it seems, in view of the decisions that the acceptance of the assignee of the leasehold, or of the subtenant of the original tenant, as a tenant under a new demise, will effect a surrender, that the transfer of possession to him may occur before as well as after the new demise. In an English case it was even decided that where, tenants of separate closes under different landlords having verbally agreed to exchange closes, each took possession of the other's close, and on a subsequent day a person representing both landlords assented to the exchange, there was evidence for the jury of a surrender by operation of law.¹⁸⁴ In a quite recent English case it is decided that there must be an actual change of possession, in order to effectuate such a surrender by a new lease to a third person, and that a mere oral assent by the tenant to a lease made to another, without any relinquishment of possession, is insufficient, although the lease is actually made, it being remarked that to hold otherwise "would be a most dangerous doctrine; it would practically amount to a repeal of the Statute of Frauds."¹⁸⁵ It is in accordance with such a view, apparently, that it has been decided in this country that a sale by one joint lessee of his interest to the other, with the lessor's assent, accompanied by an oral agreement to look to such other alone for rent, did not effect a surrender.¹⁸⁶ But, in apparent opposition to this view is the case, above

¹⁸² *Davison v. Gent*, 1 H. & N. 744.

¹⁸³ *Walker v. Richardson*, 2 M. & W. 882.

¹⁸⁴ *Bees v. Williams*, 2 Cr. M. & W. 581.

¹⁸⁵ *Wallis v. Hands* (1893), 2 Ch. 75. To the same effect, *semble*, is *Fish v. Thompson*, 129 Mich. 313.

¹⁸⁶ *Felker v. Richardson*, 67 N. H. 509.

referred to, of a surrender inferred from a new demise by the chief landlord to a subtenant already in possession, there not being, in such case, any change of possession whatever.¹⁸⁷ And there is a decision to the effect that where the lessor made a new lease to a third person, which the latter accepted, and the latter then subleased to the prior tenant, the previous lease was surrendered by operation of law.¹⁸⁸ This last decision, however, may, perhaps, be properly regarded as involving a surrender by the lessee's acceptance of a new demise, made by one to whom the landlord has made a "concurrent" lease, vesting him with the reversion, on the theory previously discussed.

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¹⁸⁷ In *Wallis v. Hands* (1893), 2 Ch. 75, *supra*, Chitty, J., says that there was, in *Thomas v. Cook*, *supra*, a change of possession, the old tenant Cook having gone out of possession when the plaintiff accepted the sublessee as his tenant. But this is not so, apparently, it being stated in the earlier case that Cook had, before such acceptance, "put in" his subtenant and thereafter distrained on him.

¹⁸⁸ *Donskersley v. Hands*, 38 Mich. 54. Compare *Fish. v. Thompson*, 129 Mich. 313, which seems to be to the same effect as *Wallis v. Hands* (1893), 2 Ch. 75, *supra*.